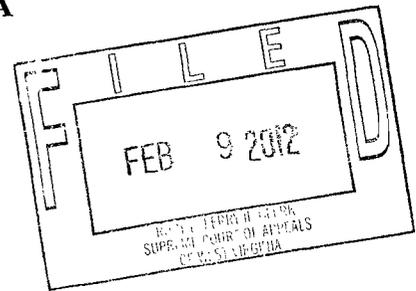


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA



STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

v.

Case Number: 101413

LARRY ARTHUR McFARLAND,
Defendant Below, Petitioner.

FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

RESPONDENT'S BRIEF

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Defendant Below, Petitioner.**

RESPONDENT’S BRIEF

Comes now the State of West Virginia (hereinafter “the State”), by and through counsel, Brandon C. H. Sims, Assistant Prosecutor in and for Jefferson County, and hereby files this brief in response to the petition previously filed.

ASSIGNMENTS OF ERROR

Respondent asserts that Petitioner’s six alleged assignments of error, listed below, are without merit:

1. The Circuit Court committed reversible error when it failed to grant a judgment of acquittal [sic] at the close of the State’s case-in-chief and again at the conclusion of all the evidence.
2. The Circuit Court committed reversible error when it allowed improper 404(b) evidence to be admitted at trial over the objection of petitioner.
3. The Circuit Court committed reversible error when it failed to make a sufficient on-the-record determination under Rule 403 of the West Virginia Rules of Evidence regarding whether the probative value of the proposed 404(b) evidence was substantially outweighed by unfair prejudice.
4. The Circuit Court committed reversible error when it allowed improper conduct at trial that unduly prejudiced Petitioner.

5. The Circuit Court committed reversible error when it made certain rulings concerning potential juror bias during voir dire.
6. The Circuit Court committed reversible error when it allowed Petitioner to be found to be a recidivist pursuant to West Virginia Code § 61-11-18.

STATEMENT OF THE CASE

Petitioner Larry McFarland was convicted by a jury of sexual assault in the second degree on January 28, 2010. Following that conviction, the State timely filed an Information alleging that the defendant had at least once previously been convicted of a qualifying offense under the recidivist statute codified at West Virginia Code §61-11-18. On March 25, 2010 the defendant appeared for arraignment on that Information and admitted to being the same person previously convicted of forcible rape, two counts of penetration with a foreign object, and sexual battery by restraint in Orange County, California in 1999. Accordingly, on April 12, 2010, the defendant was sentenced to not less than 20 nor more than 25 years in the penitentiary.

Petitioner Larry McFarland met the victim, E B., and her husband, G B., at a bar in Charles Town, WV in the spring of 2008. (01/27/10 Tr. 168: 3-9). Petitioner was invited to come to the B.'s home a few days later. (Id. 168: 19-20). Petitioner visited the B.'s Harper's Ferry, West Virginia home on Sunday May 4, 2008 and brought with him two types of alcoholic beverages and cocaine. (Id. 169: 1-9)(Id. 175: 20-23). Petitioner stayed at the B. home until the early morning hours of May 5, 2008. (Id. 202: 5-9).

The Petitioner and Mr. and Ms. B. consumed alcohol throughout the evening as they discussed music, attempted to view a music video on the computer, attempted to restore a broken Internet connection and discussed possible future plans together. (Tr. 1/27/10, 170: 7-15; 63: 5 –

11; 63: 22 – 64: 1). Petitioner advised that his neighbor had a hot tub which they could use and suggested the B.s join him in using the hot tub. (Tr. 1/27/10, 15: 12 – 15; 172: 4 – 10).

The B.s testified that the Petitioner told them that he was found civilly liable for having sex with an underage girl in California several years before. Petitioner claimed that he was 20 and the girl 17, that she had used a fake ID to get into a club where he was a bouncer and therefore he did not know her true age when the two had consensual sex. (Id. 42: 1-9).

Defendant testified at trial that when he was a kid he was “arrested for statutory rape” and pled guilty to it. (Tr. 1/27/10, 167: 9 – 14). During cross examination the Petitioner acknowledged that his testimony on direct examination that he was convicted of statutory rape was untrue. (Tr. 1/27/10, 190: 1 – 6). Petitioner also acknowledged during cross examination that he was convicted in California of forcibly raping two different women. (Id. 201: 15-21). The Petitioner penetrated the vagina of those women with his hand, while he masturbated and ejaculated on them. (Id. at p. 209: 19-23).

On the evening of May 4, 2008, the Petitioner and Ms. B. smoked marijuana, then later Ms. B. refused cocaine offered by Petitioner. (Tr. 1/27/10, 172: 15-17; 173-174: 15-24 and 1-2). Around 11 p.m. Mr. B. went to bed. (Id. 43: 10-12). Petitioner stayed and continued with Ms. B. to consume alcohol and smoke marijuana. (Id. 175: 10-21). After Mr. B. went to bed, Petitioner offered his cocaine to Ms. B. with more frequency and insistence, becoming “progressively pushy”. (Tr. 1/27/10, 45: 2 -3). Ms. B. testified that the defendant offered her cocaine repeatedly but that she refused at least eight times. (Id. 44: 1-22). Ms. B. testified that she became frustrated and annoyed by Petitioner pressuring her to use cocaine, and in response she eventually swiped her finger across the table which had cocaine on it and then put her finger on her tongue because she was tired of him asking her to try some. (Id. 45: 7-15).

Petitioner also repeatedly encouraged Ms. B. to drink alcohol. (Id. 45-46: 20-24 and 1-8). While Petitioner was seemingly trying to increase Ms. B.'s drug and alcohol intake, his own intake was slowing down. (Id. 46: 9-14). Petitioner began to repeatedly ask Ms. B. to rate his attractiveness between 1 and 10, but she refused. Petitioner told her that she was a nine. (Id. 46-47: 15-24 and 1-7). Ms. B. testified that the last thing she remembered was telling the Petitioner that she did not want to rate him because she was crazy about her husband. (Id. 47: 21-24). Petitioner testified that he and Ms. B. performed consensual oral sex on one another. (Id. 177: 3-13).

Ms. B. testified next recalling waking up the following morning in her bed still wearing the clothes that she had been wearing the night before, however her pants were on inside out and her underwear were on wrong. (Id. 48: 4-23). Mr. and Ms. B. both testified that they did not have intercourse that night, the night of May 4th to May 5th, 2008. (01/26/10 Tr. 307: 8-10 and 01/27/10 Tr. 49: 4-5). The morning of May 5, Ms. B. felt very ill, her symptoms included vomiting, chills, and severe vaginal pain. (01/27/10 Tr. 49: 9-23). Because of her lack of memory, Ms. B. called the Petitioner to ask him what had happened the night before. (Id. 179: 7-10). Petitioner told Ms. B. that she had passed out in the bathroom with her eyes still open and that he had gone home. The Petitioner denied having sex with Ms. B.. (Id. 50-51: 15-22 and 1-7). Ms. B. then contacted her husband and told him that she thought she had been raped. (Id. 51-52: 23-24 and 1-3). Mr. B. came home from work and took his wife to the hospital to have a rape kit performed. (Id. 52: 4-6). The next day Ms. B. contacted the police. (Id. 55: 21-22). At this time Ms. B. gave a written statement to Deputy Fletcher of the Jefferson County Sheriff's Department. (01/26/10 Tr. 280: 5-8). The case was then transferred to Detective Tracy Harrison who specializes in sexual assault cases. (Id. 282: 9-19).

On May 7, 2008, Deputy Fletcher picked up the sex crime kit from the hospital and took it back to the Sheriff's Office where it was secured in the evidence room. (Id. 282-283: 20-24 and 1-2). The clothes, contained therein, were tested by the West Virginia State Police Forensic Laboratory for testing. On May 22, 2008, Detective Harrison spoke with the Petitioner who stated to the detective multiple times that he did not touch or have sex with Ms. B.. (01/26/10 Tr. 249: 15-24). At this time the Petitioner also questioned the detective about the status of the case, whether semen had been found, and whether Ms. B. had given a urine sample. (Id. at p. 250: 5-18).

On April 3, 2009, Lt. H.B. Myers, a forensic scientist at the West Virginia State Police Forensic Laboratory prepared a report that indicated the Petitioner's semen was found on the crotch of Ms. B.'s underwear and also on her jeans. (01/27/10 Tr.142-143: 11-24 and 1-17). Lt. Myers' report stated that the combination of genotypes found on Ms. B.'s clothing occur randomly in approximately 1 in 280 quadrillion unrelated individuals. (State's Trial Exhibit 2; 1/27/10 Tr. 143: 5-7.).

On April 15, 2009 Detective Harrison went to the Petitioner's house to arrest him and Petitioner, without any information being conveyed to him about his arrest, stated that "the DNA results came back." The detective only replied that she could not discuss the investigation with him. (01/26/10 Tr. 256-257: 21-24 and 1-7).

SUMMARY OF THE ARGUMENT

First, Petitioner's motion for judgment of acquittal was properly denied as the evidence at trial, considered in the light most favorable to the non-moving party, was determined by both the jury and the Trial Court to be sufficient to support the conviction of the Petitioner beyond a reasonable doubt.

Second, the Circuit Court properly allowed 404(b) evidence to be admitted at trial, as it performed the analysis outlined in McGinnis. Petitioner asserts that the 404(b) evidence admitted into evidence was unrelated and irrelevant however on September 14, 2009, the first of several pre-trial hearings, the State provided testimony from a detective who discovered that the Defendant was previously convicted of sexual assault while looking into the Defendant's background. At this pre-trial hearing, the detective read from a Huntington Beach Police Department Crime Report that she obtained demonstrating substantial similarities between the past crime and the current one.

This matter was addressed again on November 23, 2009 in a pretrial hearing where the evidence of the previous crimes was again reviewed and considered for admission pursuant to West Virginia Rule of Evidence 404(b). At this time the State informed the Court that the state believed that the evidence of previous convictions was relevant because it showed motive. In its ruling on November 30, 2009, the Court found the evidence to be relevant and stated that it would be admitted.

Petitioner further asserts that only "scant, alleged written records" were used in proving that Petitioner committed the prior bad acts. However, the court was presented with a certified copy of the Petitioner's prior convictions sent by the Orange County Police Department, and the convictions were hand-signed by the Petitioner himself. Moreover, the State continued its due

diligence after the Court admitted the records over the Petitioner's objection, and obtained a missing Page 2 of the abstract, the criminal information upon which the prior conviction was based, the guilty plea form signed by the Petitioner and a three page document that is titled "Minute Order" all of which was presented under the seal of the Superior Court of the State of California for Orange County.

Third, Petitioner claims that the Trial Court committed reversible error because it failed to make a sufficient on-the-record determination under Rule 403 of the West Virginia Rules of Evidence regarding whether the probative value of the proposed 404(b) evidence was substantially outweighed by unfair prejudice. However, in the Trial Court's November 30 ruling the Court clearly stated that "the balancing test, the Rule 403 balancing test, is satisfied. . . ." Such unequivocal language appearing on the record meets the strictures of the rule set forth by this Court in McGinnis.

Fourth, Petitioner bore the burden of convincing the trial court that Juror DeSarno should have been struck for cause; he was unable to do so. This Court should not disturb the Circuit Court's ruling on the appropriateness of Juror DeSarno, because there is no clear or definite impression that that juror would have been unable faithfully and impartially to apply the law. Petitioner also argues that Juror Wynn should not have been stricken for cause on the basis that "he would hold the state to a high standard of proof." However, a review of the record shows that the juror in question indicated he needed proof "beyond all possible doubt." Accordingly, the Circuit Court properly struck him for cause.

Fifth, the Trial Court did not commit reversible error when it allowed Petitioner to be found to be a recidivist pursuant to West Virginia Code §61-11-18. A review of the record of the March 25, 2010 proceedings, demonstrates that the defendant was properly advised of his rights,

and the Circuit Court did not commit any error in accepting Petitioner's admission that he was the same individual previously convicted of other felony offenses in another jurisdiction. Moreover, Petitioner did not preserve this ground for appeal by any objection upon the record below, thus it is improperly brought as a ground of appeal here.

Sixth, Petitioner argues that the State's improper focus on the 404(b) evidence created reversible error. However, the State presented the collateral evidence for a proper purpose, the circuit court found it was relevant, and met the balancing test, and moreover, gave the jury the proper cautions and instructions as to the limited purposes for which they were to consider such evidence. Accordingly, the Petitioner was not unduly prejudiced under the *LaRock* analysis.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State acknowledges that the issues set forth in this petition have already been accepted for oral argument pursuant to Rule 19 of the West Virginia Revised Rules of Appellate Procedure. *See* February 10, 2011 Order of the Supreme Court of Appeals of West Virginia, *State v. Larry A. McFarland*, No. 101413. Further, pursuant to Rules of Appellate Procedure 10(c)(6) and 18(a), the Respondent does not waive the right to such oral argument but instead wishes to present oral argument prior to the Court issuing a decision on this matter.

ARGUMENT

- I. The Circuit Court correctly denied a judgment of acquittal at the close of the state's case-in chief and again at the conclusion of all the evidence because a rational trier of fact, taking all evidence into consideration, could have found the essential elements of Sexual Assault in the Second Degree proved beyond a reasonable doubt.**

The evidence presented by the State at trial was determined by both the jury and the circuit court to be sufficient to support the conviction of the defendant beyond a reasonable doubt. The Petitioner correctly cited the standard of review in regard to his motions for judgment of acquittal; the seminal case of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). *Syllabus Point 1* of Guthrie holds:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syllabus Point 3 of Guthrie provides:

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt as long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Petitioner Larry A. McFarland was charged and convicted of sexual assault in the second degree, pursuant to West Virginia Code § 61-8B-4 which provides:

- (a) A person is guilty of sexual assault in the second degree when:
 - (1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion; or
 - (2) Such person engages in sexual intercourse or sexual intrusion with another person who is physically helpless.¹
- (b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty-five years, or fined not less than one thousand dollars nor more than ten thousand dollars and imprisoned in the penitentiary not less than ten nor more than twenty-five years.

In its instructions, the trial court advised the jury that “the State of West Virginia must overcome the presumption that the Defendant [Petitioner] is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that, one, the Defendant, Larry A. McFarland; two, in Jefferson County, West Virginia; three, on or about a blank day in May of 2008; four, did engage in sexual intercourse or sexual intrusion; five, with E B.; six, who was physically helpless.

Elements one through five were uncontested by the Petitioner, thus the sole issue as argued by the Respondent to the jury was whether Ms. B. was physically helpless at the time of the sexual intercourse or sexual intrusion. Tr. 1/28/10, 16:20 – 21.

The Defendant asserted an affirmative defense that the defendant did not know the victim was mentally incapacitated to the point of physical helplessness. Further, the defendant asserted that Ms. B. was functioning in an alcoholic blackout during which time she consented to sexual intercourse or sexual intrusion. To support this assertion, the defense presented expert testimony

¹ West Virginia Code § 61-8B-1(1)(5) provides: “Physically helpless” means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.

regarding alcoholic blackouts, positing that individuals experiencing alcoholic blackouts “don’t know what they have done, so they don’t know what to report.” Tr. 1/27/10, 233: 17 – 18.

Ms. B. testified that she had no recollection of events after Petitioner attempted to get her to rate his attractiveness on a scale of 1 to 10. However, she testified that at no time did she give permission to the Petitioner to have sexual contact with or sexual intrusion of her body, and at no time she did not consent to sexual contact with Petitioner’s body. (Tr. 1/27/10, 57: 1 – 9). She further testified that she woke the following morning with vaginal pain, and a large bruise neither of which were present the night before. (Tr. 1/27/10, 49:22 – 23; 55: 3 – 12). The State’s expert witness testified that Ms. B.’s injuries were “consistent with sexual assault.” (Tr. 1/27/10, 101: 12.) By contrast, Ms. B. testified that she and her husband had consensual sex within 72 hours of reporting to the Sexual Assault Nurse Examiner, and that she had no injuries from that consensual sexual encounter. Thus the jury correctly determined that the injuries experienced by Ms. B. on May 5, 2008 were consistent with a forcible sexual encounter, not with a consensual sexual encounter. The Circuit Court, in turn correctly determined that when viewing that evidence in the light most favorable to the State, that a rational trier of fact could have reached the conclusion that the elements of the crime were proved beyond a reasonable doubt.

The State also presented evidence of collateral acts² of the defendant which demonstrated his methods of sexual gratification by penetrating women with his fingers while masturbating on them. This specific sexual pattern, demonstrated motive and plan of the defendant. Again, viewing the evidence in the light most favorable to the prosecution, the Circuit Court correctly determined that a rational trier of fact could have found that the elements of the crime were proved beyond a reasonable doubt.

² Collateral acts evidence presented pursuant to West Virginia Rule of Evidence 404(b) is discussed more fully below.

This court, in Guthrie, emphasized that its “review is conducted from a cold appellate transcript and record. For that reason, we must assume that the jury credited all witnesses whose testimony supports the verdict.” State v. Guthrie, 194 W.Va. 657, 670, 461 S.E.2d 163, 176 (1995). The essential facts of this case are as follows: The Petitioner visited the home of Mr. and Ms. B. in Jefferson County on the evening of May 4, 2008 and into the morning hours of May 5, 2008; Ms. B. and the Petitioner used intoxicants leaving Ms. B. so intoxicated that she lost consciousness; the Petitioner Larry A. McFarland, according to his own testimony, engaged in sexual intercourse or sexual intrusion with Ms. B.; due to Ms. B.’s intoxication and unconsciousness she was physically helpless when these acts occurred; and she was therefore unable to consent.

“Guilt beyond a reasonable doubt cannot be premised on pure conjecture. However, a conjecture consistent with the evidence becomes less and less conjecture and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely. The beyond a reasonable doubt standard does not require the exclusion of every other hypothesis or, for that matter, every other reasonable hypothesis. It is enough if, after considering all the evidence, direct and circumstantial, a reasonable trier of fact could find the evidence established guilt beyond a reasonable doubt.” State v. Guthrie, *supra*.

Petitioner argues that the jury had “no evidence to prove that Petitioner sexually assaulted the victim,” however, such an assertion conveniently overlooks the Petitioner’s own statements to law enforcement, and his semen found on the victim’s clothing. During the initial investigation on May 22, 2008, the Petitioner repeatedly told the investigating officer, Det. Harrison, that “I did not touch that girl, I did not have sex with her.” (1/26/10 Tr. 249:19 – 21). Petitioner also stated to Det. Harrison that “she would have had to make up her mind that day,

don't you need to have found semen or something?" (1/26/10 Tr. 250:11 – 13). After receiving results from the West Virginia State Police Forensic Laboratory which showed the Petitioner's semen on the victim's clothing, Det. Harrison testified that on April 15, 2009, when she went to arrest the Petitioner he asked "are you going to take me today, and I replied yes, and then he said that the DNA results came back." (1/26/10 Tr. 257:4 – 5). Lt. H. B. Myers of the West Virginia State Police Forensic Laboratory testified regarding the Petitioner's DNA found on one of the victim's jeans cuttings. A sperm fraction was found on area 45 of Ms. B.'s jeans, on the inside front waistband. The sperm fraction was compared with the known samples for the victim's husband and the Petitioner, and Lt. Myers found that the sperm was the Petitioner's. (1/27/10 Tr. 143:8 -17; 154:2 – 6). Lt. Myers' report dated April 3, 2009, which was admitted into evidence as State's Exhibit 2 indicated that "it is estimated that the combination of primary genotypes identified from the sperm fraction of the jeans area 45 cutting occur randomly in approximately 1 in 280 quadrillion unrelated individuals." *State's Exhibit 2*, page 2, "Opinion Rendered". The jury had an opportunity to view this evidence compared with the Petitioner's claims to Det. Harrison that "I did not touch that girl, I did not have sex with her," and his later claims of consensual oral sex.

However, when the jury had such an opportunity to view alternative innocent explanations for the facts presented at trial, it rejected on set of facts and accepted an alternate set of facts. As these facts built upon one another, based upon witnesses whose credibility was weighed by the jury, the evidence presented moved from the area of conjecture to proof, and thus the jury found the Petitioner guilty beyond a reasonable doubt. The Circuit Court likewise did not rely upon a cold record alone, but likewise was able to observe and oversee the proceedings, and properly ruled that the jury could have reasonably come its conclusion by finding that the

state's evidence reflected a convincing and more accurate version of the events, which refuted any innocent explanations posited by the defense, and thereby established the defendant's guilt beyond a reasonable doubt.

II. The Circuit Court correctly permitted the State to use 404(b) evidence at trial following the *McGinnis* hearings, balancing tests and appropriate on the record findings.

The Circuit Court properly allowed 404(b) evidence to be admitted at trial, as it correctly performed the analysis outlined in State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994). An initial pre-trial hearing was held on September 14, 2009, the State's Notice to Present Evidence Pursuant to Rule 404(b) was discussed, but continued until a second pre-trial hearing on November 23, 2009. The court deferred its ruling at that time, and on November 30, 2009 made its final ruling:

. . . the Court has had a chance to review the particulars of the allegations in this case, the particulars of the allegations and the conviction, the police report, and all of the factors underlying the California conviction from, I believe, 1999, I think that is the approximate date of the California conviction, based upon Mr. Kratovil has attached the use of that as 404(b) primarily upon the defect of the charging sheet or docket sheet which either lacks a triple seal or lacks a second page. I believe central to the argument that Mr. Kratovil made was the statement on that one sheet saying that this is—I can't remember the exact words—but is not to be taken as a meaningful document absent a page two, it needed page two in order to be considered a complete and lawful record in the context of whatever that sheet exactly was. The State supplemented with a good deal of information in the form of official charging documents some of them in the form of police reports apparently from the California file.

Upon looking that over, upon looking at the rules regarding 404(b), we have had the McGinnis hearing, we do find that we are satisfied by a preponderance of the evidence that the act or conduct occurred and that the Defendant is the person who did commit those acts in California, and we have found based upon that and based upon what the Court does now see as relevance as urged by

the State, the Court would permit the State the use of 404(b). We find that the balancing test, the Rule 403 balancing test, is satisfied based upon the nature of the offense, the finding that the Defendant is the person by a preponderance of the evidence who did commit the earlier offense.

The Circuit Court's ruling thereby clearly met all four prongs of the test set forth in State v. McGinnis, *supra*, which provides in Syllabus Point 2:

Where an offer of evidence is made under Rule 404(b) of the *West Virginia Rules of Evidence*, the trial court, pursuant to Rule 104(a) of the *West Virginia Rules of Evidence*, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dolin, 176 W.Va. 668, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts... If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the *West Virginia Rules of Evidence* and conduct the balancing required under Rule 403 of the *West Virginia Rules of Evidence*. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

The first step of the four-part analysis is for the trial court to “determine whether the ‘other crime’ evidence is probative of a material issue other than character. . . The prosecution has the burden of identifying a specific and relevant purpose that does not involve the prohibited inference from character to conduct.” State v. McGinnis, *supra*, 193 W.Va. at 155, 455 S.E.2d at 524. The State provided the court and Petitioner with evidence of crimes that the Petitioner had committed in the past that were strikingly similar to the crimes *sub judice*. The Petitioner was previously convicted of forcible rape, two counts of penetration with a foreign object, and sexual battery by restraint on March 8, 1999 in Orange County, California. In the commission of these

crimes the Petitioner had intercourse with one victim and penetrated the victim with his fingers against her will for sexual gratification; on a later date the Petitioner also penetrated a second victim with his fingers against her will for sexual gratification. (01/26/10 Tr. 166-167: 10-24, 1-15).

On September 14, 2009, the first of the several pre-trial hearings, the State provided testimony from Detective Harrison³ who discovered that the Defendant was previously convicted of sexual assault while looking into the Defendant's background. At this pre-trial hearing, Detective Harrison read from a Huntington Beach Police Department Crime Report that she obtained. Detective Harrison read:

The suspect began fondling the victim's vagina, placing his fingers inside her vagina and then began masturbating himself. The victim said again, she was now feeling pain in her vagina and while the suspect was masturbating, he told the victim to lift up her shirt so he could come on her. The victim said she knew what this meant and she did lift up her shirt, because she did not want semen on her shirt. The suspect then ejaculated on her. The victim said the semen from the suspect had gotten onto her bra, which was still on and partially on her shirt which he had lifted up.

(Tr. 09/14/09, 28: 4-14). The State then asked the Detective several questions about the case at hand in order to point out the similarities between the two crimes. Information about the present case gathered from this line of questioning included that, according to DNA evidence collected, the Defendant *sub judice* had ejaculated on the victim's clothing, rather than in her vagina, and that the victim in this case complained of excessive pain in her vagina. (Tr. 09/14/09, 28-29:15-24:1-4).

This matter was addressed again on November 23, 2009 in a pretrial hearing where the evidence of the previous crimes was again reviewed and considered for admission pursuant to

³ Detective Tracy Harrison and Detective Tracy Edwards are the same individual. Detective Edwards' name changed to Harrison during the pendency of this matter.

West Virginia Rule of Evidence 404(b). At this time the State informed the Court that the state believed that the evidence of previous convictions was relevant because “it shows his motive because that is the way he reaches sexual gratification.” (Tr. 11/23/09, 23:15 – 17). In its ruling on November 30, 2009, the Court found the evidence to be relevant and stated that “based upon what the Court does now see as relevance as urged by the State”. (Tr. 11/30/09, 4:15 – 17).

The second part of the analysis is that “the trial court must determine whether the evidence is relevant under Rules 401 and 402, as enforced by Rule 104. The evidence is relevant only if the jury can reasonably infer that the act occurred and that the defendant was the actor.” State v. McGinnis, *supra*, 193 W.Va. at 155-156, 455 S.E.2d at 524-525. Here, the court was presented with a certified copy of the Petitioner’s prior convictions sent by the Orange County Police Department, and the convictions were hand-signed by the Defendant. Moreover, the State continued its due diligence after the Court admitted the records, over the Petitioner’s objection. At trial, the Circuit Court commented on the records submitted by the State for admission:

Having previously seen a portion of this and having ruled that portion would be admissible, it appears that the State has, as suggested by the argument at those earlier hearings, perfected its record by obtaining Page 2 of the abstract as requested in the case that bears the Criminal Action Number 97WF1290, that she has further obtained the criminal information upon which it is based and the guilty plea form signed by the Defendant and that document that is titled “Minute Order” a two page document entitled – three pages entitled “Minute Order” all of which apparently comes under the seal of the Superior Court of the State of California for Orange County and as such I believe that it is simply more admissible than it was the last time that we ruled upon it and allowed it.

Moreover, as noted above, in its November 30, 2009 ruling on this matter, the Court stated, “upon looking at the rules regarding 404(b), we have had the *McGinnis* hearing, we do find that ***we are satisfied by a preponderance of the evidence that the act or conduct occurred and that***

the Defendant is the person who did commit those acts in California.” (Tr. 11/30/09, 4:10 – 15)(emphasis added). Further, upon examination at trial, the Defendant admitted that he was the same Larry A. McFarland who was convicted of those crimes and that the signatures on those conviction documents were his. (Tr. 01/27/10, 188: 8-24).

“If the evidence is relevant under Rule 401, the evidence is nevertheless subject to the strictures limiting admissibility under Rule 403. Under Rule 403, evidence of prior acts to prove the charged conduct may not be admitted simply because the extraneous conduct is relevant or because it falls within one or more of the traditional exceptions to the general exclusionary rule; to be admissible, the probative value of such evidence must outweigh risks that its admission will create substantial danger of unfair prejudice. The balancing necessary under Rule 403 must affirmatively appear on the record.” State v. McGinnis, *supra*. In its November 30 ruling the Trial Court clearly stated that “the balancing test, the Rule 403 balancing test, is satisfied. . .” Such unequivocal language appearing on the record meets the strictures of the rule set forth by this Court in *McGinnis*.

This Court in McGinnis also recommended that trial courts give petit juries a limiting instruction when collateral evidence is presented. “Although a trial court is not obligated to give a limiting instruction unless requested, we strongly recommend that the instruction be given unless it is objected to by the defendant. We deem the giving of a limiting instruction and its effectiveness significant not only in deciding whether to admit evidence under Rule 404(b), but the absence of an effective limiting instruction will be considered by us on appeal in weighing the prejudice ensuing from the erroneous admission of Rule 404(b) evidence.” State v. McGinnis, *supra*, 193 at 156, 455 at 525. The Court further gave guidance as to the timing of such limiting instructions, when it stated that they “should be given at the time the evidence is

offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence," *Syllabus Point 2, State v. McGinnis, supra*. The trial court, diligently followed this Court's ruling and suggestion in *McGinnis*, and gave a limiting instruction regarding this evidence both at the time the evidence was first presented⁴ (Tr. 01/26/10, 265:14 – 266:4) and during jury instruction⁵. (Tr. 01/28/10, 10: 2 – 11:2).

Accordingly, for all these reasons, it is clear from the record that the trial court properly considered the proposed 404(b) evidence, made the required findings and rulings upon the record, the State provided appropriate documentation to support the use of the evidence and that thereafter the Court properly instructed the jury as to its consideration of the evidence. Thus, pursuant to this court's holding in *McGinnis*, the Circuit Court properly admitted the evidence at trial.

Petitioner cites to a recent ruling of this court, *State v. Poore*, 226 W.Va. 727, 704 S.E.2d 727 (2010), to suggest that the circuit court did not make the necessary findings prior to admitting the Rule 404(b) evidence. However, *Syllabus Point 9* of *Poore* quotes *Syllabus Point 2* of *McGinnis, supra*, which strictures the circuit court complied with. Moreover, the collateral

⁴ At the time the evidence was presented, the court instructed the jury:

"Ladies and gentlemen of the jury, the evidence that has just been read to you by the Prosecuting Attorney is what is called under the law evidence of collateral acts or collateral misconduct. It is not to be considered by you as establishing guilt of the crime with which the Defendant is charged in this case. You may consider that evidence for a very limited purpose only. You may not consider it as proof of the charges contained in this indictment. You may consider it to show motive, intent, scheme, plan or design, if you feel that it does indeed prove that on the part of the Defendant, but you may not consider it for any other purpose, it is limited."

⁵ During jury instructions, the court advised the jury, in part:

You have heard evidence of collateral acts of misconduct not charged in the indictment in this case. You may consider that evidence for a very limited purpose only. You may not use this evidence in consideration of whether the State has established the crime charged in the indictment. Fundamental fairness dictates that the charge against the Defendant in this case must be decided on the evidence of that offense. You may not find the Defendant guilty of this charge simply because he has been convicted of an offense in the past. You may consider it only for a limited purpose, to show motive and plan on the part of the Defendant, if you feel it in fact does show such motive and plan. You may not consider it for any other purpose.

evidence offered in Poore regarded testimony of family members regarding the defendant's "very cruel" and "mean" disposition, and multiple incidents where Poore had choked, tossed, knocked, kicked, beat, punched, or threw various family members, which actions were not necessarily related to the subdural hematoma and fatal brain injury which caused the death of a three month old victim. Poore, *supra*, FN 7, 226 W.Va. at 735. In contrast, here, the collateral evidence offered showed a clear mode of operation, and method of sexual stimulation or gratification which showed a motive for committing the assault against Ms. B.. The collateral evidence was not presented for the purpose of showing the Petitioner as a "pretty violent", "explosive", "pretty irascible", "foul", or a "monster", as Mr. Poore was called by various witnesses. Poore, *supra*, 226 W.Va. at 733, and FN 7, 226 W.Va. at 735. Thus, Poore, and the court's concern therein regarding the admission of copious 404(b) evidence is clearly distinguishable from the case *sub judice*.

Petitioner further asserts that the 404(b) evidence admitted into evidence was of crimes from fifteen years ago, and that accordingly, such evidence is too remote to be relevant. This court has addressed the issue of remoteness of 404(b) evidence previously in *Syllabus Point 6 of State v. Winebarger*, 217 W.Va. 117, 617 S.E.2d 467 (2005), where the Court held: "Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion."

The Defendant in Winebarger was convicted of voluntary manslaughter, and 404(b) evidence was used that described events that had taken place 5 to 15 years prior to the crime at hand. The defendant challenged the use of such evidence as too remote to be relevant and

appropriate 404(b) evidence. In its decision permitting that evidence and the defendant's conviction to stand, this Court explained that the evidence was that "substantially similar conduct, similar circumstances, and similar provocations to the offense charged" had taken place and "acknowledging the extensive discretion vested in the trial court, we find no abuse of discretion in the lower court's findings." 217 W.Va. at 124. Petitioner's case presents similarly; evidence of his prior crimes was admitted to show that the defendant acted in the same manner, by masturbating upon his victim while penetrating his victim with his fingers, upon a similar victim a female, and for a similar purpose, to reach sexual gratification. These factors were deemed to constitute a motive for the Petitioner to commit the act, and thus the Circuit Court determined the evidence admissible for that purpose.

III. The Trial Court properly and sufficiently made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence regarding whether the probative value of the proposed 404(b) evidence was substantially outweighed by unfair prejudice.

The Circuit Court properly allowed 404(b) evidence to be admitted at trial, following the analysis required by McGinnis, and by ensuring that all four prongs of the test set forth in McGinnis were met. *Syllabus Point 2* of McGinnis sets forth those standards, and as discussed above, the circuit court addressed each issue in turn and made findings regarding the same upon the record.

State v. LaRock, W.Va. 294, 470 S.E.2d 613 (1996) provides in *Syllabus Point 3*:

It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

The Defendant claims, specifically, that the Trial Court committed reversible error because it failed to make a sufficient on-the-record determination under Rule 403 of the West Virginia Rules of Evidence regarding whether the probative value of the proposed 404(b) evidence was substantially outweighed by unfair prejudice. However, in the Trial Court's November 30 ruling the Court clearly stated that it was "satisfied by a preponderance of the evidence that the act or conduct occurred and that the Defendant is the person who did commit those acts in California." Further the court found the evidence relevant and ruled that "the balancing test, the Rule 403 balancing test, is satisfied. . ." Such unequivocal language appearing on the record meets the strictures of the rule set forth by this Court in McGinnis.

Respectfully, the Defendant's claim of the insufficiency of this on-the-record determination under Rule 403 of the West Virginia Rules of Evidence appears to be based out of subjectivity and fails to be backed by any case law or authority. The Trial Court properly and sufficiently made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence as directed and outlined the rulings of this court.

IV. The Circuit Court properly conducted jury voir dire, and the striking or retention of potential jurors.

Petitioner cites to the applicable law that, "The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause[]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." State v. Mills, 219 W.Va. 28, 631 S.E.2d 586 (2005).

Petitioner argues that Juror DeSarno, whose son is a member of the Charles Town Police Department, a law enforcement agency in Jefferson County which did not investigate the Petitioner's case, should have been struck for cause based upon the close professional relationship law enforcement agencies within the county. In support of his motion to strike, Petitioner's counsel argued that the juror's son, as a law enforcement officer in the county was "cross-sworn" as a member of the county sheriff's department which did investigate the case. The State argued that the juror "didn't really know what cross-sworn is the term that Mr. Kratovil used, but I think that he is clearly a member of a department not appearing here, she indicated she thought she could be fair, I don't think that there is a clear reason to strike her for cause." (Tr. 1/26/10, 59: 16 – 21). Petitioner bore the burden of convincing the trial court that the juror should have been struck for cause; he was unable to do so. This Court should not disturb the Circuit Court's ruling on the appropriateness of Juror DeSarno, because there is no clear or definite impression that that juror would have been unable faithfully and impartially to apply the law.

Petitioner also argues that Juror Wynn should not have been stricken for cause on the basis that "he would hold the state to a high standard of proof." (Petitioner's brief, p. 17). However, a review of the record shows that the juror in question indicated he needed proof "beyond all possible doubt." (Tr. 1/26/10, 77:9 – 10. "Once a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning later retractions, or promises to be fair." O'Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002), *cited with approval*, State v. Newcomb, 223 W.Va. 843, 679 S.E.2d

675 (2009). Juror Wynn indicated he would hold the state to a burden of proof of beyond all possible doubt. Accordingly, the Circuit Court properly struck him for cause.

V. The Circuit Court correctly instructed the defendant on his rights regarding his ability to contest the recidivist information filed by the State.

Petitioner argues that the record does not establish that Petitioner was ever informed of his right to a separate jury trial regarding whether the Petitioner had previously been convicted of a qualifying offense, pursuant to West Virginia Code § 61-11-19. However, Petitioner's counsel did not previously have access to the transcript of the arraignment proceedings which refute this argument.

On March 25, 2010, the Petitioner appeared for arraignment at which time the following occurred on the record:

THE COURT: So, Mr. McFarland, the procedural name for what we are doing here this morning is an arraignment on this Information. Have you been given a copy of the Information, Mr. McFarland?

THE DEFENDANT: Yeah.

MR. KRATOVIL: We went over it.

THE COURT: All right.

Mr. McFarland, do you understand now that the State—I don't know what version of this information you went over—apparently, the State came up with a version that alleged that it comprised two priors, let's call them felonies, for purposes of recidivism and the State now realizes that given the sequencing of the convictions and offenses that really only one legally would comprise but have you seen those allegations?

THE DEFENDANT: Yeah.

THE COURT: Mr. McFarland, Mr. Kratovil now apparently represents that the allegation is the same allegation that was made in the 404(b) issue of your trial with regard to those California convictions and as such Mr. Kratovil says that it would be your intention to simply admit that allegation, is that your intention today, sir?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. McFarland, you know if you wanted to push it and to fight it and to contest this and to even have a jury trial on this issue, you have the right to do that, that is simply your election, do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. But all those rights I think we have gone over in the past with you but you have seen a literal exercise of them by having gone to trial yourself, but you would have the right to contest this with all of those same rights that you utilized when you went to trial. Do you wish to give up those rights with regard to this discreet issue and to simply admit this?

THE DEFENDANT: Yes.

THE COURT: All right.

Mr. Kratovil, do you think that suffices in terms of a colloquy on the issue?

MR. KRATOVIL: I think it does. It is a very limited issue. I think Mr. McFarland understands and admits that he had been convicted and did time in California so to deny it would be untrue.

The State submits that a review of the record of the March 25, 2010 proceedings, which Petitioner's counsel did not previously possess, demonstrates that the defendant was properly advised of his rights, and the Circuit Court did not commit any error, but instead twice informed the defendant upon the record of his right to a trial by jury on the recidivist information. Nonetheless, the Petitioner instead elected to admit that he was the same person as that listed in the indictment, and as put so succinctly by his trial counsel, "Mr. McFarland understands and admits that he had been convicted and did time in California so *to deny it would be untrue.*" Moreover, the Petitioner admitted in his testimony in his defense that he was the same person convicted of those offenses in California. Finally, notwithstanding appellate counsel's diligent attempts to raise this issue for the first time on appeal, Petitioner did not preserve such an error

below, and accordingly, this Court does not possess jurisdiction to address an issue not preserved below.

This Court has stated that it will not consider issues not previously raised and thereby preserved for appeal at the trial court level. “This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.” *Syl. Pt. 3, State v. Cline*, 206 W.Va. 445, 525 S.E.2d 326 (1999). “To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” *Syl. Pt. 2, State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996).

Where as here, trial counsel did not preserve any objection on this issue below, and the party failed to articulate with sufficient distinctiveness so as to alert the circuit court to the nature of the alleged defect, this court may not address such an issue. Trial counsel did the opposite of object to this recidivist information, instead affirmatively stating that the defendant was the same individual charged therein, and no objection was raised. Accordingly this court is without jurisdiction to address this ground of appeal.

VI. The Petitioner was not unduly prejudiced by any conduct at trial.

The State of West Virginia properly noticed the Petitioner and trial counsel of its intent to use collateral evidence, pursuant to West Virginia Rule of Evidence 404(b). Hearings were held on three separate dates⁶ to address the matter.

“It is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction,” pursuant to this court’s holding in *Syllabus Point 3 of State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). The Trial Court, performed the McGinnis analysis and met the requirements necessary to have properly admitted the 404(b) evidence at trial. However, a review of the record also demonstrates that the Petitioner was not unduly prejudiced by the State,

⁶ An initial pre-trial hearing was held on September 14, 2009, the matter was discussed, but continued until a second pre-trial hearing on November 23, 2009. The court deferred its ruling at that time, and on November 30, 2009 made its final ruling:

“ . . . the Court has had a chance to review the particulars of the allegations in this case, the particulars of the allegations and the conviction, the police report, and all of the factors underlying the California conviction from, I believe, 1999, I think that is the approximate date of the California conviction, based upon Mr. Kratovil has attacked the use of that as 404(b) primarily upon the defect of the charging sheet or docket sheet which either lacks a triple seal or lacks a second page. I believe central to the argument that Mr. Kratovil made was the statement on that one sheet saying that this is—I can’t remember the exact words—but is not to be taken as a meaningful document absent a page two, it needed page two in order to be considered a complete and lawful record in the context of whatever that sheet exactly was. The State supplemented with a good deal of information in the form of official charging documents some of them in the form of police reports apparently from the California file.

Upon looking that over, upon looking at the rules regarding 404(b), we have had the McGinnis hearing, we do find that we are satisfied by a preponderance of the evidence that the act or conduct occurred and that the Defendant is the person who did commit those acts in California, and we have found based upon that and based upon what the Court does now see as relevance as urged by the State, the Court would permit the State the use of 404(b). We find that the balancing test, the Rule 403 balancing test, is satisfied based upon the nature of the offense, the finding that the Defendant is the person by a preponderance of the evidence who did commit the earlier offense.”

which offered the 404(b) evidence of collateral acts for a legitimate purpose, to show motive and plan. The State argued as to motive that the defendant:

. . . has a very specific method of sexual gratification. He likes to masturbate on top of a victim while he penetrates them with his hand or fingers. That is how he reaches sexual climax. To be more crude, that is how he gets off. How do we know this, what turns him on, because he has been convicted of doing the exact same thing twice previously. He has done it before and he did it here to E B. on May 4th or May 5th of 2008.

You will recall State's Exhibit No. 1 he pled guilty to penetrating Julie M. and Jennifer R., two different women, in California the exact same way as E B. was penetrated. He masturbated on both of them just as he masturbated on E B..

Now what kind of person does that? Somebody who gets a sexual thrill out of doing that, somebody who reaches gratification through doing that.

Is that a motive? You bet it is.

Petitioner argues that the State spent an "inexplicable magnitude of time" during opening statement on the 404(b) evidence. A review of the opening statement transcript shows the State expended a mere two sentences on the collateral acts evidence:

But even more compelling than all of those things, you are going to hear that the Defendant has previously been convicted in California in 1999 of two counts of sexual penetration with a foreign object and one count of forcible rape and another count of sexual battery. You will hear from the record of those convictions that the Defendant's method of sexual gratification is to penetrate his victim with an object, usually his hand or his finger, while he masturbates on them.

The State's closing argument mentions the collateral evidence three times: first, in relation to motive to commit the crime (Tr. 1/28/10, 18:2 – 14); second, in relation to the Petitioner's lack of credibility, when he initially claimed on the witness stand to have committed statutory rape, when in fact he was convicted of forcible rape and admitted to it under cross examination, (Tr.

1/28/10, 28: 5 - 31: 5); and third, again in relation to his method of gratification, or motive (Tr. 1/28/10, 33:1 – 6).

The State presented the collateral evidence for a proper purpose, the circuit court found it was relevant, and met the balancing test, and moreover, gave the jury the proper cautions and instructions as to the limited purposes for which they were to consider such evidence. Accordingly, the Petitioner was not unduly prejudiced under the LaRock analysis.

CONCLUSION

WHEREFORE, for all the reasons cited hereinabove, the State does hereby request that the Supreme Court of Appeals does DENY the Petition for Appeal previously filed.

Respectfully submitted,
STATE OF WEST VIRGINIA

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,**

v.

Case Number: 101413

**LARRY ARTHUR McFARLAND,
Defendant Below, Petitioner.**

CERTIFICATE OF SERVICE

I, Brandon C. H. Sims, Assistant Prosecutor for Jefferson County, West Virginia and counsel for the Respondent do hereby certify that on this 11th day of April, 2011, I have served a true copy of the foregoing, "Respondent's Brief" upon the following by United States Mail and email:

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